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No. 96-52

In the
Supreme Court of the United States
OCTOBER TERM,

RAYMOND REECE,
Petitioner,

v.

HOUSTON LIGHTING & POWER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY MEMORANDUM IN SUPPORT OF CERTIORARI

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Respondent's Brief in Opposition to the Petition for a Writ of Certiorari ("Opp.") further underscores the need for this Court's review of the issues in this case — whether state law claims of racial discrimination are completely preempted by section 301 of the Labor-Management Relations Act ("LMRA"), and so automatically removable to federal court, simply because the employer raises the collective bargaining agreement ("CBA") as a defense to the state law claim.

Perhaps most significant, respondent does not deny that the lower federal and state courts are in considerable disagreement in their treatment of the preemption of statutory anti-discrimination claims, and are truly in disarray over the preemption of common law emotional distress claims. Respondent expressly acknowledges the direct conflict between the Fifth and Ninth Circuits, Opp. 21-22 n.24, but ignores the widespread disagreement among the lower courts described in the Petition at 13-15, 16-18, 21-22. Respondent's

elaborate answer is that the Fifth Circuit and the various courts that have sided with it are right on the preemption issue, and that other courts are wrong. But none of that, even if accepted, would sustain the principal flaw in the ruling below — its vast expansion of removal jurisdiction.[1]

A. The Removal Issue.

Respondent recognizes, at the outset of its Opposition, that removal based solely on preemption is at the heart of this case. To show that removal was proper, respondent then proceeds with an extensive analysis of the preemption question, and indeed, suggests that, if the Court concludes that the case was properly removed based on the inclusion of a claim of intentional infliction of emotional distress ("IIED"), then it would be unnecessary to decide whether the statutory discrimination claim was preempted. We address that erroneous argument below, at 7-8 n.2; for now, it suffices to note that, under respondent's analysis, the issues of removal and preemption are one and the same. Thus, to decide whether a case like this one is properly removed, a district judge must first conduct an exhaustive analysis of the merits of the employer's preemption defense, like the twenty pages of preemption argument that respondent devotes to it here. And it must be addressed with the benefit of only such authorities as the parties can assemble within the tight schedule allowed by 28 U.S.C. §§ 1446(b) and 1447(c) for removal petitions and remand motions, and with no discovery or other elaboration of the plaintiff's claim. It is precisely to avoid the need for federal courts to resolve the merits of cases, in order to decide whether they have jurisdiction, that petitioner asks the Court to grant review here to enforce the rulings in *Caterpillar v. Williams*, 482 U.S. 386 (1987), and *Oklahoma Tax*

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[1] Respondent does not object to the Court's consideration of petitioner's "removal based on a CBA defense" argument. *Cf.* Pet. at 23-24 n.12. Any objections to consideration of that part of the question are therefore waived. Rule 15.2.

Commission v. Graham, 489 U.S. 838 (1989), that it is the rare case in which a federal claim not pleaded in the complaint can ever be removed based on complete preemption.

We acknowledge that a plaintiff whose state cause of action actually seeks to enforce a CBA cannot avoid removal by artful pleading where a disputed CBA-based claim is necessary to the success of the action. *See* Opp. 3 n.1. But, by the same token, as the Court stressed in *Caterpillar*, the artful pleading doctrine does not trump the plaintiff's right to be master of his own complaint. 482 U.S. at 394-395, 397. If the plaintiff chooses to rely **only** on state law claims and not on the CBA, neither the fact that the plaintiff might also have claims under the CBA, as respondent contends he does, Opp. 5-7, nor the fact that respondent may point to the CBA to **negate** plaintiff's claims, as the court of appeals ruled and respondent also contends, Opp. 19 and n.20, warrants removal to federal court.

Contrary to respondent's accusation, Opp. 25-30, petitioner does not question *Avco Corp. v. Machinists Lodge No. 735*, 390 U.S. 557 (1968). To the contrary, that case prescribes a removal principle that is far narrower than respondent suggests. In *Avco*, an employer had sued in state court for the avowed purpose of enforcing a CBA's no-strike clause, and the Court held only that such cases, whether brought in state or federal court, arise exclusively under federal law and hence are removable. The Court did not hold in *Avco* that state employment discrimination or tort cases necessarily arise solely under federal law, and *Caterpillar* and *Oklahoma Tax Commission* make clear the limits of this removal doctrine, in that a complaint based on state law grounds may not be removed simply because the CBA may negate those claims. Far from showing why the holding and reasoning of these cases does not forbid removal here, respondent contents itself with a brief footnote which points out irrelevant factual distinctions between those cases and this one. Opp. 28 n.31.

Respondent also contends the case was removable because, with respect to one of the ways in which petitioner claims to have been subjected to racial discrimination — the denial of a promotion to foreman on one occasion — his complaint noted that a white employee with less seniority had received that promotion. Because seniority rights themselves are a creature of contract, respondent argues, all of petitioner's claims necessarily depend on the CBA and consequently are preempted and, in turn, removable. Respondent argues that this shows that the holding of the Court below actually and properly rests on a "rare" set of facts requiring reference to a CBA to resolve a state law discrimination complaint.

This defense of the decision below fails as a reason to avoid certiorari for several reasons. First, although we do not doubt that a decision may be affirmed for reasons not cited by the lower court, the Fifth Circuit did not rely on, or even refer to, this allegation in the complaint in explaining why petitioner's claims were preempted and hence removable. Quite to the contrary, the court of appeals made no bones about the fact that preemption was based on the fact that "the interpretation of the CBA is made necessary by an employer's defense." Pet. App. 3a.

Nor, in fact, is that alternate ground for affirmance present here. Neither petitioner's complaint as a whole, nor even the one fragment that respondent cites, rests on the CBA. The complaint, which appears as Item F in the Record Excerpts below, and has been lodged with the Clerk, is based on allegations of racial discrimination. The alleged discrimination is set forth in numbered paragraphs IV (actually consisting of two unnumbered paragraphs) and V (actually consisting of three unnumbered paragraphs). The reference to the seniority of a white employee who received one of the promotions that petitioner was denied is contained in one of the three subparagraphs of paragraph V, and was intended to show the existence of evidentiary support for petitioner's contention that he was denied this promotion not for one of the most commonly proffered legitimate reasons — that the

other candidate had more experience — but for racial reasons only.

Moreover, even that promotion-denial claim does not depend on an interpretation of the CBA. There is no dispute about where petitioner stands on the seniority list; nor does petitioner contend that he was entitled, under the CBA, to the promotion (or to training opportunities, for that matter). To be sure, if there were a dispute about those facts, it might prove necessary to construe the CBA in order to resolve that dispute. But this Court said in *Livadas v. Bradshaw*, 114 S. Ct. 2068, 2078 (1994), that the mere fact that contract terms must be consulted in the course of deciding a state law claim does not suffice to preempt the state law claim. And, finally, if the CBA is only a defense, as the Fifth Circuit stated in finding preemption, *Caterpillar* makes clear that that is not a basis for removal.

2. The Preemption Issue.

Respondent's arguments against review of the preemption issues in the case are similarly faulty. It contends first that promotion and training questions may be resolved by the CBA's grievance and arbitration procedure. Opp. 5-7. This argument is legally irrelevant because this Court squarely held in *Lingle v. Norge*, 486 U.S. 399 (1988), that the fact that a state law claim may be parallel to one that could have been presented under a CBA does not warrant preemption by the LMRA. The argument is also somewhat disingenuous because the CBA in this case, as respondent observes later in its Opposition, at 14-16, expressly reserves to respondent the sole discretion to assign head journeymen like petitioner or to promote them to higher positions. Indeed, respondent has consistently maintained, and in other litigation it has successfully argued to the Fifth Circuit, that even for rank-and-file employees, for whom the CBA does not expressly reserve such discretion, the right to file a grievance over promotions does not empower an arbitrator to second-guess respondent's assessments of employee ability, skill or qualifications. *Houston Lighting & Power Co. v. IBEW Local 66*, 71 F.3d

179 (5th Cir. 1995), *cert. pending*, No. 95-1757. Thus, respondent's contention that petitioner could have brought a seniority grievance is mystifying at best.

In an effort to treat this case as sui generis, and hence not worthy of review, respondent claims that its reliance on portions of the CBA in defense of a charge of violation of state law is rare. In fact, it is quite typical of what happens in cases alleging racial discrimination, or retaliation for filing a workers compensation or other state law claim, or indeed handicap discrimination. An employee alleges that he or she was treated differently from other workers. The employer replies that the employee was treated the same as other workers, citing either common workplace rules, such as those in a CBA, or specific examples of persons who received similar treatment. Then the employee responds by trying to show that the employer's counterexamples involved different considerations and hence are being cited pretextually. Accordingly, if respondent were correct that the presence of such an employer defense is enough to require preemption (and hence removal), then all unionized employers will be able to exempt themselves from state law employment claims.

This case would have been no different if the CBA said that there is no such thing as seniority in this workplace. In that event, petitioner's claim against respondent would nevertheless be the same, and could be pursued against respondent under state law without necessitating any examination of the CBA. In such a situation, the petitioner's claim would be almost identical to that of a non-unionized, "at-will" employee who worked without the coverage of any CBA or other contractual provision for seniority. Even in such circumstances, it often happens that persons who have worked for the employer for a longer time are more likely, for a variety of reasons, to be given chances for training and promotion, and in such cases the fact that a particular employee who happened to be black was repeatedly passed over in favor of less experienced white employees would surely be an evidentiary point supporting a claim of discrimination. Just as this

evidentiary point may be invoked in such a case without preempting the state law claim, so may it be invoked here.

That the CBA here does include seniority provisions, while withholding any seniority benefits with respect to promotion and assignments for head journeymen like petitioner, actually makes it much like the hypothetical at-will workplace or non-seniority CBA discussed above. But if references to seniority are sufficient to warrant preemption of state law claims, then it is hard to imagine **any** state law claim that would not be held preempted once the court below reached this stage of the analysis. Thus, far from being sui generis, the holding below logically stands for the proposition that an employer defense based on the CBA will almost always suffice to warrant preemption of a state law claim.[2]

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[2] Respondent contends that petitioner did not appeal from the summary judgment below, but only from the order of remand, and consequently that if the emotional distress claim was properly held to be preempted and therefore removable, it is unnecessary to reach the question of whether the statutory discrimination claim was preempted and therefore removable. Opp. 11. This argument is without basis. Both the Notice of Appeal, *see* Record Excerpts, Item B, and petitioner's brief below, *see* Statement of the Case, page 1, expressly attacked the order granting summary judgment; that brief not only discussed the preemption issues at great length, but relied primarily on cases that involved only preemption and not removal. Respondent's brief was similarly addressed, in principal part, to issues of preemption, and expressly acknowledged that "[t]he primary dispute centers on whether, under the particular facts of this case, the LMRA preempts Reece's race discrimination claim under the Texas Labor Code." Br. at 5. The issue was therefore fully preserved below.

Moreover, even if the case had been properly removed based on preemption of the emotional distress claim, the judgment below could not be affirmed in its entirety unless petitioner's statutory discrimination claim was also preempted. And, indeed, even if preemption of the emotional distress claim is proper, the lower

(continued...)

Respondent's effort to avoid review of the preemption of the emotional distress ("IIED") component of petitioner's race discrimination claim should also be rejected. In its Opposition, at 9-10, respondent suggests for the first time that Texas law does not permit IIED claims to be brought either in the employment context generally, or based on allegations of race discrimination specifically. This argument was not advanced either in the court of appeals (respondent's brief in that court has been lodged with the Clerk) or in the district court, and so may not be relied on here.

The argument is also quite mistaken for several reasons. Most important, if petitioner's state law claims lack merit, that does not give respondent the right to remove them to federal court. It is true that, in the cases cited by respondent, particular employment-related IIED claims were held by federal courts to be insufficient under Texas law. But in other cases, both Texas and federal courts have upheld IIED suits based on general employment and employment-discrimination claims. *E.g., Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1145 (5th Cir. 1991); *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 307 (5th Cir. 1989); *Guzman v. El Paso Natural Gas Co.*, 756 F. Supp. 994 (W.D. Tex. 1990); *Bushell v. Dean*, 781 S.W.2d 652 (Tex. App. — Austin 1989), *writ denied in part, rev'd in part on other grounds*, 803 S.W.2d 711 (Tex. 1991). Even the authority cited by respondent acknowledges that such a claim may be available in such cases, if the facts are strong enough. *See MacArthur v. University of Texas Health Center*, 45 F.3d 890, 898-899 (5th Cir. 1995) (citing *Bushell*, *Dean*, and *Wilson*). *See also Wornick Co. v. Casas*, 856 S.W.2d 732 (Tex. 1993).

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[2](...continued)
courts might exercise their discretion to remand the remaining state claim to state court. Therefore, this issue cannot be avoided even if the holding on the emotional distress claim is affirmed.

On the merits of the preemption issue, respondent points to a handful of decisions from other courts stating that particular IIED claims could not be resolved without looking at the provisions of the CBA to decide whether its actions were sufficiently outrageous. And some circuits do say that, in some cases; the law review article cited by respondent, Opp. 14, similarly urges that IIED claims arising out of the employment relationship should automatically be preempted. But as the petition showed, at 17-18, a number of other courts have been willing to uphold IIED claims against preemption because they determined that the facts alleged were so extreme that no construction of the CBA could aid the employer in its defense of the case.

Here, the employer relies on a CBA provision that does no more than place respondent on the same footing vis-a-vis petitioner as a nonunion employer would be against an at-will employee — that is, the CBA expressly refrains from regulating the employer's promotion and assignment of head journeymen. No construction of this provision would aid the defense of an IIED case, assuming, of course, that the state courts and a state jury find the facts compelling enough to make out a case of IIED in the first place. It is precisely the failure of the court below to consider the specific provisions of the CBA at issue, on the theory that the mere existence of a CBA that addressed questions of promotions and assignments was enough to warrant preemption, that puts it at odds with other lower courts and warrants this Court's review of the preemption of the common law tort of IIED, as well as the statutory component of petitioner's race discrimination claim. And, of course, if the Court agrees with petitioner on the removal issue, the preemption claims will be decided in the first instance by the Texas, not federal, courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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